

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 Facsimile: 415.837.1516
www.allenmatkins.com

James L. Meeder
E-mail: jmeeder@allenmatkins.com
Direct Dial: 415.273.7471 File Number: 178861-00005/LA914100.03

Via Email/U.S. Mail

November 29, 2011

U.S. EPA Region 9, FOIA Officer OPA-3
75 Hawthorne Street
San Francisco, CA 94105
Email: r9foia@epa.gov

Re: Amended Freedom of Information Act Request Concerning Greka Oil & Gas, Inc.

To Whom It May Concern:

On behalf of HVI Cat Canyon, Inc., f/k/a Greka Oil & Gas, Inc. ("Greka"), this letter responds to the October 28, 2011 letter of Michael Massey, Assistant Regional Counsel for the United States Environmental Protection Agency ("EPA"). Mr. Massey's letter responded to Greka's October 3, 2011 request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA").

Mr. Massey's letter states that EPA "expects that it will take six months or more to fully process [Greka's] request" and that "the work required to provide the documents requested will cost \$30,000." For the reasons set forth herein, Greka believes that it was inappropriate for Mr. Massey, rather than the Region 9 FOIA Officer, to respond to Greka's FOIA request. Moreover, the response failed to make available EPA's FOIA Public Liaison, as required by law. Finally, Greka questions the basis for the amount of Mr. Massey's fee estimate. Nevertheless, Greka has amended its FOIA request, as set forth herein, in an effort to reduce the cost and time frame associated with EPA's response.

A. Mr. Massey Is Not the Appropriate Party to Respond to Greka's FOIA Request

EPA's FOIA regulations provide as follows: "Authority to grant or deny requests. *The head of an office, or that individual's designee*, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate." 40 C.F.R. § 2.103(b), emphasis added. Likewise 40 C.F.R. § 2.104(h) provides: "Initial denials of requests. *The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices are delegated the authority to issue initial determinations.* However, the authority to issue initial denials of requests for existing,

located records (other than initial denials based solely on Sec. 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent." (Emphasis added.)

Mr. Massey's October 28, 2011 letter states that "EPA ... will provide non-privileged, responsive documents on an ongoing basis." Thus, it purports to grant Greka's FOIA request. However, Mr. Massey is titled an "Assistant Regional Counsel", and therefore does not hold one of the specifically enumerated positions responsible for granting FOIA requests and issuing initial determinations, as set forth above, nor is there any indication that he has ever been delegated authority to respond. For this reason alone, he is not the appropriate respondent to Greka's FOIA request. Moreover, Mr. Massey recently appeared as counsel for the United States Environmental Protection Agency in a hearing before the Honorable Dean D. Pregerson in the matter *United States of America et al v. HVI Cat Canyon Inc.*, Central District of California Case No. 2:11-cv-05097-DDP-RZ. In that matter, the United States has asserted multiple claims for civil penalties against Greka under the Clean Water Act.

Mr. Massey's dual role as a member of the federal prosecution team in the referenced action and as the FOIA respondent creates a potential conflict of interest inconsistent with EPA's stated "mandate for greater transparency" in its FOIA responses. (See, e.g., Testimony of Larry Gottesman at Congressional Hearing on FOIA, March 18, 2010, http://epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0318_lfg.pdf.) Accordingly, Greka requests that the amended FOIA request set forth herein be addressed by the appropriate Region 9 FOIA Officer, rather than by counsel assigned to the prosecution of claims against Greka.

B. The Response Failed to Provide a FOIA Public Liaison

FOIA requires that, where an agency extends the statutory time limits for responding to a request, the agency make available its FOIA Public Liaison. Specifically, 5 U.S.C. § 552(a)(6)(B)(ii) provides as follows:

With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.* (Emphasis added.)

5 U.S.C. § 552(l) provides that "FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes." Thus, the FOIA Public Liaison serve a critical role in assuring the fair administration of FOIA by EPA.

Mr. Massey's October 28, 2011 letter offers Greka the opportunity to limit the scope of its request pursuant to 5 U.S.C. § 552(a)(6)(B)(ii). However, the letter does not provide any information regarding EPA's FOIA Public Liaison, as required by the statute. In light of Mr. Massey's role as a member of the prosecution team assigned to the action filed by the United States against Greka and as the FOIA respondent, Greka believes that a FOIA Public Liaison should be made available to avoid an appearance of impropriety and to assure the fair and impartial processing of Greka's request. Greka therefore requests that, as required by the statute, EPA identify the FOIA Public Liaison so that Greka can deal directly with that person in obtaining timely responses.

C. The Fee Estimate Is Unsupported

Pursuant to FOIA, EPA may recover "...only the direct costs of search, duplication, or review." (5 U.S.C. § 552(a)(4)(A)(iv).) The statute further provides that "[r]eview costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section." (*Id.*)

Mr. Massey's October 28, 2011 letter "estimates that the work required to provide the documents requested will cost \$30,000." Mr. Massey further states that "approximately 10,000 documents will need to be reviewed." This amounts to \$3.00 per document. Greka questions whether this is a fair estimate of the "direct costs of search, duplication, or review" of each document, particularly as Greka would anticipate efficiencies of scale if there are as many documents implicated as Mr. Massey claims. Thus, Greka would like to discuss with the FOIA Public Liaison, Mr. Massey's estimate, the costs of Greka's modified FOIA request set forth below, and the time frame associated with EPA's production of the requested documents.

D. Greka's Amended FOIA Request

Greka has amended its FOIA request and narrowed the scope thereof by removing the requests for EPA communications with (1) elected or appointed officials of any state or local agency in the State of California unless specifically specified; (2) employees of the Governor's

Office of the State of California; (3) employees of the California State Water Resources Control Board; (4) employees of the California Regional Water Quality Control Board, Central Coast Region; and (5) other local or state agencies in California, including the California Office of the Attorney General. Greka has also removed the request for any meetings or communications that EPA has had internally with respect to Greka.

Therefore, pursuant to FOIA, Greka submits the following amended request that EPA provide copies of all public records and writings, as defined in 40 C.F.R. § 2.100(b), in the possession, custody, and/or control of EPA that are related to, relied upon, or associated with:

1. EPA's preparation for and participation in a meeting with United States Congresswoman Lois Capps, representing California's 23 District, on or about April 2, 2008, regarding Greka oil spills, as described in the EPA email chain enclosed herewith;
2. For the time period from January 1, 2005 to the present, all meetings and communications EPA has had regarding Greka with members of Congress and/or employees of members of Congress;
3. For the time period from January 1, 2005 to the present, all meetings and communications EPA has had regarding Greka with members of the California State Legislature and/or employees of members of the California State Legislature;
4. For the time period from January 1, 2005 to the present, all meetings and communications EPA has had regarding Greka with elected or appointed officials and/or employees of Santa Barbara County;
5. For the time period from January 1, 2005 to the present, all meetings and communications EPA has had regarding Greka with council members and/or employees of the City of Santa Maria, California;
6. For the time period from January 1, 2005 to the present, all meetings and communications EPA has had regarding Greka with officials and/or employees of the United States Coast Guard; and
7. For the time period from January 1, 2005 to the present, all meetings and communications EPA has had regarding Greka with officials and/or employees of the California Department of Fish & Game.

Collectively, items 1-7 above are referred to as "EPA Meetings and Communications re Greka."

The materials responsive to this request include but are not limited to:

1. EPA internal correspondence and communications, including but not limited to emails, letters, memoranda, and notes of calls, regarding EPA Meetings and Communications re Greka;
2. Drafts of briefing papers, materials, updates, and any other documents prepared in advance of the EPA Meetings and Communications re Greka;
3. Materials provided at the EPA Meetings and Communications re Greka, including briefing papers, materials, updates, presentation materials, and any other documents; and
4. Correspondence and communications, including but not limited to emails, letters, memoranda, and notes of calls, with third parties, including but not limited to other agencies and employees thereof, regarding the EPA Meetings and Communications re Greka.

Please respond to this request within twenty (20 days) after receipt of this letter, pursuant to 5 U.S.C. § 552(6)(O)(i). To the extent EPA claims the right to withhold any record, or portion of any record, please describe with specificity each and every record, or portion of every record, that is being withheld, along with the claimed reason for exemption on which EPA relies for withholding the record, or portion thereof.

Greka asks that EPA provide an estimate of the direct costs of search, duplication, or review in responding to this amended request, consistent with 5 U.S.C. § 552(a)(4)(A)(iv). If EPA determines that the requested records are voluminous and/or that it may be easier or less expensive to make some or all of the documents available for copying by an outside copy service, please so notify the writer identified below so that appropriate arrangements can be made. To help EPA determine Greka's status for the purpose of assessing fees, EPA should know that Greka is a private business and seeks the above-described information for use in its business.

Thank you for your assistance with this matter.

Very truly yours,

/s/ James L. Meeder

James L. Meeder

JLM:elm

Cc via email only: Michael Massey, Assistant Regional Counsel